(16)

Supreme Court Case No. 02-1196

In The

Supreme Court of the United States

SECURITY EXCHANGE COMMISSION,

Appellant,

v.

CHARLES E. EDWARDS, ET. AL.

Appellees.

On Appeal from the 11th Circuit Court of Appeals
(From the United States District Court for the
Northern District of Georgia D.C.,
Case No. 00-02532-CV-JTC-1)

MOTION FOR LEAVE TO FILE OUT-OF-TIME AMICUS CURIAE BRIEF IN SUPPORT OF APPELLEES

John D. Harris
Randy D. Lang
Harris Law Firm, P.C.
1741 E. Morten Ave., Suite B
Phoenix, Arizona 85020
(602) 340-1234 (Office)
(602) 944-0908 (Facsimile)
Attorneys for Amicus Curiae
For Financial World Companies, Inc.

MEMORANDUM OF POINTS AND AUTHORITIES

Financial World Companies, Inc., a Colorado Corporation, Owners/Lessors, with stockholder interest(s) in ETS, Payphones, Inc., a corporation and DOES 15,000 similarly situated (hereafter sometimes referred to as "Financial World Companies"), Owners/Lessors "DOES 15,000", (collectively referred to as "Financial World Companies", hereby respectfully move for leave to file out-of-time the attached Brief Amicus Curiae in this case. The consent of the attorney for the Petitioner, Securities and Exchange Commission ("SEC"), was requested and was granted. The consent from the attorney for the Appellees, Charles E. Edwards, ETS Payphones, Inc., et. al., has also been obtained.

Financial World Companies' interest in this case arises from the fact that it and 15,000 people entered into a purchase/"leaseback" and lessor/lessee relationship based on the integrated written agreements (Exhibits 2 through 5) of the Amicus Curiae Brief herewith. The lessor/lessee relationship and agreements with Lessee ETS provided for the lessor, Financial World to have a dominant, controlling and reversionary interest while vesting the Lessee with a limited, subservient and possessory interest in certain property, strictly subject to full compliance with the subject Lease. The integrated leaseback agreements are commonly used to establish the reality of the relationships and control over the subject property.

Financial World Companies, and DOES 15,000, as Lessors, received the benefit of the services from ETS and PSA without losing control and the discretionary decision-making over their investments (payphones). Financial World Companies' interests and their positions were not asserted in the Unites States District Court for the Northern District of Georgia or the Eleventh Circuit Court of Appeals, as set forth in the Brief. The issue was not fully presented as to Financial World Companies' understanding that these were lease contracts which still provided it with full control over the

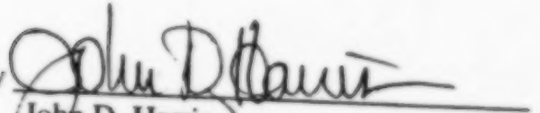
payphones and related equipment, and all aspects of the payphone, despite the fact that the payphones were leased back to ETS for management, in exchange for a fixed monthly lease fee. There was no discussion as to Financial World Companies' interest, as affected and protected under the Interstate Commerce Act, as leases, versus the improper interpretation of such leases as "investment contracts" by the United States District Court. Because ETS was ordered to stop making lease payments to Financial World Companies and DOES 15,000, also owners of the payphones, ETS had to stop the sale and leaseback of the new payphones and new telephone sites relative to the leases. Both ETS and PSA were thereafter forced to file a Voluntary Petition for Bankruptcy and Reorganization. Financial World Companies was left with no choice but to purchase the interests of ETS in bankruptcy in order to protect what little interests remained in their leases. Financial World Companies and DOES 15,000 have been damaged in the sum of millions of dollars.

In the instant case, the main issue in the Eleventh Circuit Court of Appeals was whether the leases constitute an investment contract under this Court's decision in Securities and Exchange Commission v. W.J. Howey Co., 328 U.S. 293, 66 S.Ct. 1100, 90 L.Ed. 1244 (1946). Neither the Eleventh Circuit Court of Appeals or the United States District Court for the Northern District of Georgia dealt with the interstate commerce issue or the issue of control as to the Financial World Companies' Lessors' knowledge, skill, and experience with the payphone equipment, maintenance, management, or location issues. These critical issues must be presented to this Court in relation to its decision in the SEC v. Howey Co. case and its impact on the continuity of the application of law under the interpretation of the Albanese v. Florida Nat. Bank of Orlando, 823 F.2d 408 (11th Cir. 1997) decision. Since it is likely that the Petitioner may pursue the same course of action by ignoring these key issues affecting Financial World Companies, as Owners herein, it is believed

that the Brief which the Amicus Curiae is requesting permission to file will contain a more complete argument on the constitutional issue affecting the pivotal issues of control and knowledge, skill, and experience, as the same relate to that issue. If this argument is accepted, it would be dispositive of the case. This brief clarifies issues left unresolved in the case of SEC v. Howie Co., and the Albanese v. Florida Nat. Bank of Orlando case, supra.

RESPECTFULLY SUBMITTED this 29th day of October, 2003.

HARRIS LAW FIRM, P.C.

By 

John D. Harris
Harris Law Firm, P.C.
1741 E. Morten Avenue, Suite B
Phoenix, AZ 85020
(602) 340-1234
Counsel for Financial World Companies, Inc. and DOES 15,000

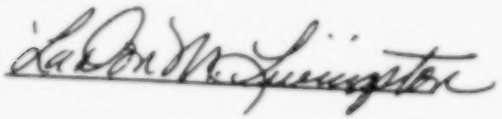
ORIGINAL of the foregoing mailed and faxed this 29th day of October, 2003 to:

Securities and Exchange Commission
SEC Headquarters
450 Fifth Street, NW
Washington, DC 20549
United States Attorney General
Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530

Atlanta District Office
Richard P. Wessel
District Administrator
3475 Lenox Road, N.E., Suite 1000
Atlanta, GA 30326-1232
Susan S. McDonald, Esq.
Securities & Exchange Commission
450 5th Street NW
Washington, D.C. 20549

Catherine A. Broderick, Esq.
U.S. Securities and Exchange Commission
450 Fifth Street NW
Washington, DC 20549

Michael K. Wolensky, Esq.
Kutak Rock LLP
225 Peachtree Street, SE
Suite 2100
Atlanta, GA 30303-1731
Attorneys for Appellees

By 

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AMICUS CURIAE BRIEF OF FINANCIAL WORLD COMPANIES, INC. IN SUPPORT OF APPELLEES

John D. Harris
Randy D. Lang
Harris Law Firm, P.C.
1741 E. Morten Ave., Suite B
Phoenix, Arizona 85020
(602) 340-1234 (Office)
(602) 944-0908 (Facsimile)
Attorneys for Amicus Curiae
For Financial World Companies, Inc.

QUESTIONS PRESENTED FOR REVIEW BY AMICUS CURIAE IN SUPPORT OF APPELLEES

1. Whether the 11th Circuit Court of Appeals was accurate in distinguishing the definition of "investment contract" from a "lease", as Congress intended under the Securities Act of 1933, as amended, such that U.S.C.S. §77(b)(a)(1) and *SEC v. W.J. Howey Co. et. al.*, do not apply.

2. Whether the 11th Circuit Court of Appeals properly determined that the written and integrated "leaseback" agreements providing the Owner/Lessor with control involving their landlord-lessee type relationship was sufficient to distinguish it from of *SEC v. W.J. Howe Co., et al.* and 15 U.S.C.S. § 77(b)(a)(1) under the facts herein and why construing the "leaseback" as an "investment contract" would result in an undue burden on interstate commerce violating the Unites States Constitution.

PARTIES TO THE PROCEEDING

This Amicus Curiae Brief is filed by Financial World Companies, Inc. in support of Appellee(s) Charles E. Edwards, ("Mr. Edwards") who is the Defendant and Respondent in this case before the United States Supreme Court. In the underlying action, Mr. Edwards was the principal in several business entities and was the founder and majority stockholder of E.T.S. Payphones, Inc., a Georgia corporation, ("ETS") the lessee involved in the lease of the coin-operated telephones and the payphone equipment lease program. He was also the founder of Payphone Systems Acquisitions, Inc., a Georgia corporation (referred to herein as "PSA"). PSA was a wholly owned subsidiary of ETS. PSA purchased telephone equipment and locations, which were then sold at wholesale prices to certain distributors. He was also the principal owner of a company known as Twin Leaf, Inc., a Georgia corporation ("Twin Leaf"), which was a consulting company created to provide support services to ETS, a lessee and lessor. Mr. Edwards, ETS, PSA, and Twin Leaf were the Defendants in the underlying action filed in September, 2000 by the Securities and Exchange Commission (herein sometimes referred to as the "SEC") in the United States District Court for the Northern District of Georgia, D.C., in Case No. 00-02532-CV-JTC-1.

These Amicus Curiae are not parties in the underlying action but the underlying action directly affected their interests. Amicus Curiae, Financial World Companies" or "Financial World", a Colorado corporation, (herein sometimes referred to as "Financial World Companies, Inc." and other same or similarly situated persons involved with the Financial World Companies, Inc. entity were the Owners and Lessors who/which contracted (See Exhibits 1 through 5 attached) with Appellee ETS in the subject payphone

businesses. The Owners/Lessors generally consist of approximately 15,000 Payphone Owners. Their collective interests exceed Five Million Dollars ($5,000,000) of payphones which were leased to ETS Payphones, Inc. for management and other related services. Financial World Companies, Inc. and other similarly situated Owners/Lessors purchased ETS and PSA in the subsequent ETS and PSA bankruptcy matters. On August 13, 2003, Financial World Companies, Inc., on behalf of itself and DOES 1-15,000 similarly situated lessors, served upon the Securities and Exchange Commission, the United States Attorney General and the United States Department of Justice their Notice of Governmental Claim. Such claims are representative of the interests of more than 60,000 payphones with an approximate invested value of over $5,000,000, said payphones leased to ETS, and $210,000,000 in lease payments, all of which were directly affected by the Securities and Exchange Commission's actions.

STATEMENT PURSUANT TO RULE 37(6) OF THE SUPREME COURT RULES OF COURT

Amicus Curiae Financial World Companies, Inc., Owners/Lessors, as a representative of other same and similarly situated Lessors, did not receive any assistance from any party or monetary contribution toward the preparation or submission of this Amicus Curiae Brief from any person or entity other than from said Amicus Curiae itself and its members.

STATEMENT PURSUANT TO RULE 29.6 OF THE SUPREME COURT RULES OF COURT

Amicus Curiae Financial World Companies, Inc. and other similarly situated members it represents and for

whom/which it has filed this Brief were forced to purchase the interests of ETS in ETS' bankruptcy matter. They did so in order to protect what little interest(s) remained after the businesses of ETS and PSA failed. They are now shareholders and owners of ETS and PSA by virtue of a certain bankruptcy Settlement Agreement. Under that Agreement, Amicus Curiae Financial World Companies, Inc. and other similarly situated ETS / PSA stockholders represent approximately one hundred percent (100%) of the total payphones leased by ETS and represent ownership of 100% of the stock of ETS and PSA.

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II. Whether the 11th Circuit Court of Appeals properly determined that the written and integrated "leaseback" agreements providing the owner/lessor with control is sufficient to distinguish the lack of controlling *SEC v. W.J. Howe Co., et al.* and 15 U.S.C.S. in defining the payphone "leases" as "an investment contract" within the meaning of 15 U.S.C.S. § 77(b)(a)(1) under the facts herein and why construing the "leaseback" as an "investment contract" would result in an undue burden on interstate commerce violating the United States Constitution.

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Source: http://www.legis.state.ga.us/cgi-bin/htsearch
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OPINIONS BELOW

The Opinion of the 11th Circuit Court of Appeals, which reversed the District Court, is reported at 300 F.3d 1281 (2002). The order of the District Court granting the Securities and Exchange Commission's Motion for a Preliminary Injunction, which was later vacated by the 11th Circuit Court of Appeals, is reported at 123 F. Supp. 2d 1349 (2002).

JURISDICTION

The Judgment of the 11th Circuit Court of Appeals was entered on August 6, 2002. A Petition for Rehearing was denied on November 15, 2002. The Petition for a Writ of Certiorari was filed on February 13, 2003 and was granted by this Court on April 21, 2003. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The United States Constitution provision involved is the Interstate Commerce Clause, Const. Art. I, Sec. 8. The Federal statute, 15 U.S.C. 776(a)(1) and (d), § 77(b)(a)(1), and § 78(c)(a)(10), which are provided in the Appendix to the Petition for Writ of Certiorari, are incorporated herein by this reference (Pet. App. 30a-31a).

STATEMENT OF THE CASE

Factual Background

Financial World Companies, Inc. and the other similarly situated Owners/Lessors of the payphones, (herein

collectively referred to as "Financial World" or "Financial World Companies, Inc." or "Financial World Companies"), submit their Amicus Curiae Brief in support of Charles E. Edwards ("Mr. Edwards"), E.T.S. Payphones, Inc. ("ETS"), Payphone Systems Acquisitions, Inc. ("PSA") and Twin Leaf, Inc. ("Twin Leaf"), (herein sometimes collectively referred to hereinafter as "Appellees"). Mr. Edwards was the principal in several business entities and was the founder and majority stockholder of ETS. Mr. Edwards was a member of the ETS Board of Directors and served as its Chief Executive Officer at all times referenced herein. ETS was incorporated to provide management services, including placement, advertisement, maintenance, coin collecting, and accounting for the subject Owners/Lessors and approximately 15,000 similarly situated Owners/Lessors. Financial World Companies, Inc. is a typical representative of said Owners/Lessors for this Amicus Curiae Brief. Mr. Edwards also founded PSA, a corporation. PSA was a wholly owned subsidiary of ETS. PSA purchased telephone equipment in locations which it then sold at wholesale prices to certain distributors. Mr. Edwards was also the principal owner of a company known as Twin Leaf, a Georgia corporation. Twin Leaf was a consulting company and was created to provide support services to ETS, the Lessors and Lessees. Financial World Companies, Inc. and other similarly situated persons/entities received benefits from the services provided by ETS and PSA.

Another company, unrelated to the entities identified herein, is an entity known as BEE Communications, Inc. ("BCI"). It sold payphone(s) and protective enclosure(s) and other items (hereinafter sometimes referred to as the "payphones", "equipment",and/or "additional equipment") and are more particularly set forth in Exhibits 2 through 5, attached hereto and incorporated herein by this reference.

For example, Exhibit 2 is a "Bill of Sale" which makes reference to Exhibit 3, an Equipment List, which describes the equipment as ten (10) units of operating payphone stations, telephone numbers, their exact locations, identified by unit and by payphone(s)' serial number. It is incorporated into Exhibits 2 through 5 by reference herein.

The Bill of Sale clearly indicates the total amount of the consideration the Grantee and, Owner, Financial World Companies, Inc., paid (for the payphones) to the Grantor/Seller BCI. It also is the actual conveyance, sale, transfer, assignment, deliverance, and grant of the payphone, and it forever vests and conveys all of the rights, title, and interests in the payphones and equipment, as indicated in the BCI Purchase Agreement (Agreement No. 25178) and the Equipment List (Exhibit 3). The Bill of Sale (Exhibit 2) also contained a warranty of merchantability (Id., ¶ 5) and contains the official gold seal of the Grantor, BCI, and is fully executed by the authorized persons. Further, the Bill of Sale contains all of the serial numbers to the payphones and equipment, matching those on the Equipment List (Id. 2 and 3). After Financial World Companies, Inc. purchased the telephone equipment in December 15, 1999, it entered into an agreement with ETS to lease back the payphone units, such that ETS would be bound by the specific terms and conditions of the Telephone Equipment Lease Agreement (herein referred to as the "Lease Agreement"and attached hereto as Exhibit 4). In pertinent part, the Lease Agreement provided, as follows:

a. The Lessee, ETS, agreed to lease the equipment from the Owner/Lessor Financial World Companies, Inc., subject to the Lease terms and conditions (Id. p. 1);

b. The Lease was in full force and effect for an initial

term of sixty (60) months ("the Initial Term"). Upon expiration of the Initial Term, the Lease will be automatically renewed for an additional sixty (60) months (the "Renewal Term") unless at least ninety (90) days prior to the end of the Initial Term either party gives notice to the other that it elects not to continue during the Renewal Term. The monthly rental payment for the equipment during the Renewal Term shall be the same as the existing rate under the Initial Term. Should the Lessor, Financial World Companies, Inc., chose to terminate the Lease and take possession of the equipment and location prior to the Lease expiration, it may do so with a ninety (90) day written notice to ETS (Exhibit 4, ¶ 2);

c. ETS shall pay a monthly rental fee to Owner/Lessor Financial World Companies, Inc. for the equipment at the rate of $82.00 per month per unit. The monthly rental payments, with the exception of the first one, shall be due on the first or fifteenth day of each succeeding calendar month in the amount stated and shall be sent by United States mail on the 1st or 15th day of each month unless the 1st or the 15th day falls on a Saturday or Sunday, in which event the check may be sent the following Monday (Exhibit 4, ¶3);

d. The Lease Agreement creates a lease of the equipment indicated on the Equipment List (Exhibit 3) and absolutely does not allow ETS to be deemed or construed to have acquired any right, title, or interest in the equipment or location; provided, however, if Financial World Companies, Inc. obtains an offer from any third party for the purchase of the equipment, then, and in that event, Financial World shall provide ETS with written notice of the proposed sale and terms thereof, and ETS shall have thirty (30) days from the receipt of such notice in which to give written notice to Financial World Companies, Inc. of its election to purchase

the equipment upon the same terms or conditions of any/said third-party offer. This is customarily known as a "Right of First Refusal" and is stated in most contracts of this nature. If ETS does not submit written notice within the subject thirty (30) day period, then the Owner/Lessor Financial World Companies, Inc. shall be free to sell its equipment pursuant to such third party offer. If ETS notifies Financial World Companies, Inc. of its election to purchase, then ETS shall have 180 days to close the sale from the date of the original notice it receives from Financial World Companies, Inc. (Exhibit 4, pars. 4 and 15). It is an unquestionable ownership right, title, and interest to the payphones' telephone number and the location that is as fully vested to the Owner/Lessor, Financial World Companies, Inc. (Id. ¶ 4);

e. This Lease is acknowledged as a "Net Lease," requiring ETS to bear the entire cost of using the equipment and maintaining same in accordance the terms and conditions of the Lease. ETS shall be responsible for and pay all expenses of insurance, repair, taxes, service, and maintenance of the payphones and the location; but ETS may be allowed, at its own cost and expense, to contract with any third parties to provide management, repairs, service, and maintenance to the payphones and for the location at its own cost (Exhibit 4, ¶ 5). **There are in excess of 1,600 third parties available to each and all of the Owner/Lessors for said purposes. (Decl. of Hooper at ¶ 8).**

f. ETS shall be responsible for selecting the location for installation of the payphone; and as the Lessee, it the sole authority and right to move the payphones to a new location should the original location prove to be unprofitable or prove to be in a high vandalism area. However, ETS must notify Financial World Companies, Inc. in writing in the event of a site exchange and Financial World Companies, Inc. will

receive the notification of the address of the new location. ETS shall assign the applicable location lease to Financial World Companies, Inc. by written Letter of Assignment (Exhibit 4, ¶ 6);

g. In the event Financial World Companies, Inc. terminates the lease prior to the expiration of the Term and elects to retain the payphones, ETS shall assign the applicable location lease to Financial World Companies, Inc. by a written Letter of Assignment between the parties; otherwise ETS shall retain the rights to the location (Exhibit 4, ¶ 6);

h. ETS shall indemnify and hold Financial World Companies, Inc. harmless from any and all loss, damage, liability, taxes and expenses (including, without limitation, reasonable attorneys fees) which Financial World Companies, Inc. shall incur as a result of (i) the loss of or damage to the payphone equipment and/or location because of fire, theft, collision, lightning, flood, windstorm, or any other casualty at any time during the "Term" of the Lease or (ii) the death of or injury to any person or damage to any property as a result, in whole or part, of the use or maintenance of the aforesaid at any time during the Term of the Lease (Exhibit 4, ¶ 7(a));

i. Lessee ETS must maintain insurance policies issued by an insurance company reasonably satisfactory to Financial World Companies, Inc. with all premiums prepaid for the coverage, insuring Financial World Companies, Inc. against the risks and hazards specified in ¶ 7(a)(i), with a minimum coverage of $100,000 for property damage, $500,000 for the death of or injury to any one person, and $2,000,000 for any one occurrence involving the payphone, equipment, or the location (Exhibit 4, ¶ 7(b));

j. If Lessee ETS fails to obtain the said insurance

coverage, it shall not affect ETS' obligations under the Lease; and the loss, damage, or destruction of the payphones or equipment shall not terminate the Lease (Exhibit 4, ¶ 7(c)). Financial World Companies, Inc. shall have the option to procure or maintain such insurance coverage for the account of ETS, and ETS shall reimburse Financial World Companies, Inc. within seven (7) days after receipt of any invoice for any payment made by Financial World Companies, Inc.. If ETS fails to reimburse Financial World Companies, Inc., it shall be deemed a default under Section 10 of the Lease. Such provision also triggers certain default remedies for Financial World (Exhibit 4, ¶¶ 7, (c) 10), as provided below;

k. Lessee ETS is required to pay all use taxes, personal taxes, property taxes, and any other taxes related to the payphone, equipment or site location (Exhibit 4, ¶ 8);

l. Only Lessee ETS has control of the payphones, equipment and location, but only as long as it is not in default of any of the terms and conditions of the Lease Agreement or as otherwise subject to the rights of Financial World Companies, Inc. (emphasis supplied) as set forth in the Lease (Exhibit 4, ¶ 9);

m. Lessee ETS shall comply with any and all laws and regulations applicable to the operation of the payphones equipment and the location and shall be solely responsible for the payment of any and all fines or penalties from its failure to comply therewith (emphasis supplied), (Exhibit 4, ¶ 9);

n. Lessee ETS shall maintain the payphones and equipment in good working order at the location or any other location where the payphones and equipment may have been relocated, as allowed under the Lease. ETS may add further parts or accessories to the payphones, provided any such

addition does not materially affect or materially impair the value of the payphone equipment or the location, and any such additions shall become the property of Financial World Companies, the Owner/Lessor (Exhibit 4, ¶ 9);

o. In the event Lessee ETS defaults under the Lease, it is responsible to pay all amounts that become due within twenty (20) days after receiving notice of such default from the Owner/Lessor, Financial World Companies, Inc., so as to cure the default (Exhibit 4, ¶ 10(a)(1) and (2)). If ETS files an involuntary petition in bankruptcy or insolvency under the reorganization provisions of any law, or a receiver is appointed for ETS or for the property of ETS, the Lease shall continue and remain undischarged or unstayed for an aggregate period of thirty (30) days. Thereafter, it shall be deemed in default under the Lease (Exhibit 4, ¶ 10(a); ¶(s) 3 and 4);

p. If Lessee ETS abandons the payphone, equipment, or location or discontinues operation of the payphones or fails to notify Financial World Companies, Inc. of any relocation within sixty (60) days, or fails to remove within thirty (30) days any mechanics' liens on the payphones or location for additional work performed, it shall be deemed in default under the Lease (Exhibit 4, ¶ 10(a); ¶(s) 5, 6, and 7). Such operates as an additional control device for Financial World Companies, Inc;

q. If Lessee ETS defaults under the said Lease, Financial World Companies, Inc. may terminate the Lease and utilize the self-help remedy of repossession of the payphones, equipment, and the location; and the same shall be deemed automatically assigned to the Owner/Lessor without demand or legal process and ETS shall be liable to Financial World Companies, Inc. for any deficiencies between the amount of the rental agreement due under the Lease Agreement, and the

cost of re-letting the payphones and equipment, including all reasonable attorneys fees and costs incurred (Exhibit 4, ¶ 10(b)(1) and (2));

r. Further, Financial World Companies, Inc. and others similarly situated shall have other rights and control of and under the Lease, such as the right to inspect the payphones, equipment, and location at any time (Exhibit 4, ¶ 12), the right to sell the payphones, equipment, and/or the location at any time (Exhibit 4, ¶ 15), the right to dispute resolution of any of the Lease provisions and the right to request a temporary restraining order, preliminary injunction, or similar equitable relief dispute shall be settled by arbitration in accordance with the American Arbitration Association. The Lease binds both parties, their heirs, executors, administrators, successors and assigns (Exhibit 4, ¶(s) 22 and 23).

Also, the parties executed and agreed to be bound by the "Option to Sell Agreement" (hereafter sometimes referred to as the "Option Agreement") dated December 15, 1999. The Option Agreement provides that Financial World Companies, Inc., as the Owner/Lessor, has the right to require ETS to purchase the equipment prior to or upon termination of the Lease Agreement (Exhibit 5, ¶ 4) for the purchase price of Seven Thousand Dollars ($7,000.00) per unit. The Option Agreement also provides Financial World Companies, Inc. and others with dispute resolution procedures under the rules of the American Arbitration Association (Exhibit 5, ¶ 7).

The facts set forth above are provided from the personal knowledge of Mr. Frank G. Hooper, President and CEO of Financial World Companies, Inc., who executed each of the agreements, (Exhibits 1 through 5), in his capacity as an Owner/Lessor herein. See Hooper Declaration ¶ 4. Since the date the parties entered into these numerous agreements,

(Exhibits 1 through 5), the Lessors regularly received the benefits of those agreements until approximately September of 2000, as more fully explained below.

Proceedings in Other Courts

In or about September, 2000, the Securities and Exchange Commission ("SEC") filed an SEC securities violation action against ETS in the United States District Court for the Northern District of Georgia, D.C., Case No. 00-02532-CV-JTC-1, claiming that the integrated written agreements (Exhibits 1through 5) constituted regulated security investment contracts which had not been registered by ETS and that ETS was in violation of federal securities laws. It immediately sought a preliminary injunction from the subject United States District Court alleging ETS sold securities in violation of the registration and anti-fraud provisions of 15 U.S.C. §§ 77(e)(a), 77(e)(c), 77(q)(a), 78(j)(b), and under 17 Code of Federal Regulations § 240.10(b)(5) and requested that the District Court enter a preliminary injunction in favor of the SEC. That same United States District Court then improperly determined that it had jurisdiction over the SEC action and granted a preliminary injunction enjoining Mr. Edwards and ETS from alleged future violations of the securities laws. It also froze Mr. Edwards assets and ETS' assets. ETS and PSA were forced to file a Voluntary Petition for Bankruptcy and Reorganization under the Federal Bankruptcy Act because ETS was compelled to stop making the lease payments to the telephone Owners/Lessors, Financial World Companies, Inc. and those above-referenced 15,000 other similarly situated Owners/Lessors, including those represented by this Amicus Curiae Brief. Because of the SEC's acts and conduct, ETS was also compelled to stop its program of honoring the buy-back guarantees, pursuant to the written contracts (Exhibits1

through 5). Further, ETS was required to stop the sale and lease-back of new payphones and new telephone locations relative to the Lease Agreement. As a further result of the SEC's actions, ETS' financing capabilities were shattered, hastening its demise. Financial World Companies, Inc. and other similarly situated Lessors, were forced to exchange their payphones, etc. for the lesser valued stock of ETS in bankruptcy. Financial World Companies, Inc., took this action to try to protect what little equity and interest which remained for the Owners/Lessors of the payphones, equipment, and locations. Anyone involved with ETS and PSA were considered to be involved and engaged in widespread fraud. Such had the effect of impugning the reputation of not only ETS and PSA, but also of Financial World Companies, Inc. and all other similarly situated persons who once supported and/or continued to support Mr. Edwards, ETS, and PSA and their positions that no Securities and Exchange Act or other violation(s) were being committed by ETS and others. See Declaration of Hooper at ¶ 7, 9.

ETS and PSA and others appealed the United States District Court's decision in favor of the SEC to the 11th Circuit Court of Appeals. They analyzed the United States Supreme Court case of *Securities and Exchange Commission v. W.J. Howey Co.*, 328 U.S. 293 (1946) and argued that it and the 11th Circuit Court of Appeals case of *Albanese, et al. v. Florida National Bank of Orlando*, 823 F.2d 408 (11th Cir. 1987) supported their position against the SEC. Albanese, supra., analyzed what constituted an "investment contract" as a security, pursuant to the *SEC v. Howey* case and the three-pronged test thereunder. After the 11th Circuit Court of Appeals applied the *SEC v. Howey, supra.*, analysis and the law of *Albanese et al. v. Florida National Bank of Orlando* to this case, it concluded that the District Court, in its analysis of ETS' integrated written Agreements (Exhibit 2 through 5),

did not constitute an "investment contract". The 11th Circuit Court then reversed the Judgment of the District Court for the Northern District of Georgia, D.C., and vacated the preliminary injunction in favor of ETS, and related parties. The SEC then filed a Petition for Certiorari to this Court, and this Court accepted same.

This case fundamentally concerns whether the integrated written agreements, (Exhibits 1 through 5) provided [control] and [ownership] to Financial World Companies, Inc. and others, as the Owners/Lessors of the payphones, telephone numbers, equipment, and locations. It also concerns the District Court Decision concerning chilling effect that District Court Decision has on interstate commerce by categorically deeming that all lease and/or leaseback contracts are "investment contracts" under the Securities and Exchange Act, supra. Financial World Companies, Inc. and others assert that after the United States Supreme Court reviews the facts herein and applies the applicable law to those facts that the Supreme Court will be compelled to sustain the 11th Circuit Court of Appeals decision in favor of ETS et. al., Respondents, herein.

SUMMARY OF THE ARGUMENT

Congress specifically omitted the words "lease" and "leaseback" from (A) the definitions of "security" in Section 2(a)(1) of the Securities and Exchange Act of 1933, as amended, (herein sometimes referred to as the "Securities Act"), from (B) 15 U.S.C. 77(b)(a)(1) and specifically from (C), the general term of "investment contract". Leases and leaseback agreements are fundamentally not investment contracts. To include leases and leaseback agreements as investment schemes or investment contracts, within the definition of the Securities Act, would impair and impugn the

Interstate Commerce Clause. It would result in a chilling effect on interstate commerce throughout the United States, rendering vague and ambiguous the terms "lease" and "leaseback" in every State definition in every commercial and private lease and/or leaseback contract.

Further, the factual and legal effect of "control" items in this case, which are enforceable under the lease and leaseback agreements, distinguish the agreements from "investment contracts" under the Securities Act.

ARGUMENT

I. WHETHER THE 11TH CIRCUIT COURT OF APPEALS WAS ACCURATE IN DISTINGUISHING THE DEFINITION OF "INVESTMENT CONTRACT" FROM A "LEASE", AS CONGRESS INTENDED UNDER THE SECURITIES ACT OF 1933, AS AMENDED, SUCH THAT U.S.C.S. §77(b)(a)(1) AND *SEC V. W.J. HOWEY CO. ET. AL.*, DO NOT APPLY.

This Supreme Court, in its long standing decision of *Securities and Exchange Commission v. W.J. Howey Co. et al.*, 328 U.S. 293 (1946), analyzed an offering of units of a citrus grove development coupled with a contract for cultivating, marketing, and remitting the net proceeds of same to the purchaser/investor and developed a three-pronged test which has been followed in nearly every Circuit Court of Appeals in the United States.[1] The *Howey* decision by this

[1] According to Shepherd citation, bound Vol. 1 from 1946 through Sept. 1, 2003, Vol. 102, No. 17 through Vol. 102, Sept. 15, 2003, No. 18, the *Howey* case has been cited as followed and controlling over 150 times in the last 56 years. It has been rarely dissented to and even more rarely questioned in its judgment. The cases which distinguish it seem to distinguish it only on the issue of control, which is at issue here.

Court also carefully analyzed the issue of how much [control] the purchaser or investor actually had under the totality of the circumstances of the contractual dealings. It made a special note that the facts were undisputed and that W.J. Howey Co. and Howey In-The-Hills Service, Inc. are Florida corporations under the "direct common control and management of the Howey Companies, Inc.." it also noted that the Howey Companies, Inc. owned the large tracts of citrus acreage and that during the past several years had planted about 500 acres of citrus annually, keeping one-half of the groves for itself and offering the other half to the public to allegedly "help us finance additional development" (Id. p. 293). Further, the Decision noted that the various written land sale contracts with the Howey Companies, Inc. were entered into with the purchasers and that upon full payment of the purchase price, the citrus land is to be conveyed to the purchaser by a warranty deed. All the purchaser actually received, however, under the purchase contract, was a sliver or strip of land arranged so that an acre consisted of a row of 48 citrus trees which were contained in a tract which was not separately fenced. The sole indication of separate ownership is found in small landmarks intelligible only through a plot book of record (Id. p. 293). The management contract affecting the land sales agreement was of a 10-year duration, without an option of cancellation and gave the Howey In-The-Hills Service Inc. a leasehold interest and "full and complete" possession of the acreage. For a specified fee plus the cost of labor and materials, the Howey Company was given full discretion and authority over the cultivation,

growth, harvest and marketing of the crops (Id., p. 296). This Court then wisely noted the Howey Company was a significantly dominant player, well established in the citrus business, and maintains a large force or skilled personnel and a great deal of equipment, which included 75 tractors, sprayer wagon(s), fertilizer trucks and the like. "Without the consent of the company, the landowner or purchaser has no right of entry to market the crop; thus, there is ordinarily no right to specific fruit. The company is accountable only for an allegation of the net profits based upon a checkmate at the time of picking. All the produce is picked by the respondent companies, which do business under their own name." (Id. p. 296). Of great importance, the Court noted, "The purchasers for the most part are non-residents of Florida. They are predominately business and professional people who lack the knowledge, skill, and equipment necessary for the care and cultivation of citrus trees." (Id. at p. 296).

In the ETS case before the bench, however, the "leverage and control" features should be factually analyzed. The parties complied with the terms and conditions of the integrated lease written agreements. These agreements controlled the operative functions of the leases between Lessor and Lessees therein.[2] Leases are not mentioned by Congress in the classes of securities which are identified as exempted securities under 15 U.S.C. § 77(c)(a). The first part or test of the analysis set forth by this Court under the Howey case is for the Court to look for the substance of the written agreements which control the interests of the parties

[2] Congress is structuring the limited parameters of The Securities and Exchange Act of 1933. 15 U.S.C.S. §§ 77(b) defines the term "security" and specifically omits the word "lease" and/or "leaseback" contacts from the Act. See 15 U.S.C.S. § 77(b)(a)(1) [Definitions].

and to disregard form over substance, **placing the emphasis on the economic reality of the control feature based on the written terms and conditions between the parties which are legally enforceable in a judicial setting.** *SEC v. Howey* at p. 298 emphasis supplied).

Analysis of the substance of Exhibit 2, the "Bill of Sale." The Bill of Sale has the legal effect of transferring and vesting complete ownership of the payphones and equipment to the Owner/Lessor, i.e., Financial World Companies, Inc., as follows:

> "For a consideration of the payment of $70,000.00 for ten (10) payphones, as indicated on the BCI Purchase Agreement #25178 and other good and valuable consideration to Grantor (BCI) in hand paid by Grantee (Financial World Companies, Inc.) and/or before the execution and delivery hereof, the receipt and sufficiency whereof are hereby acknowledged, Grantor has conveyed, granted, bargained, sold, transferred, assigned, delivered, and confirmed, and by this Bill of Sale does convey, grant, bargain, sale, transfer, assign, deliver, and confirm unto Grantee its successors and assigns, forever, all of that certain equipment consisting of payphone(s) and protective enclosure(s) (hereinafter referred to as the "equipment") as more particularly set forth on Exhibit A to be sent to you by the designated management company." (Exhibit 1, ¶ 2).

> "To have and to hold all of said equipment hereby assigned, transferred, and conveyed unto Grantee, its successors and assigns, forever." (Exhibit 2, ¶ 3).

"Grantor covenants and agrees with Grantee to warrant and defend title to the equipment sold to Grantee against all and every persons whomsoever and warrants that the title transferred is good and its transfer rightful." (Exhibit 2, ¶ 4).

Moreover, the Bill of Sale provides a Warranty of Merchantability and Fit for the Particular Purposes Sold representation. It is said to be "free of any material defect for the period of sixty (60) days following the date" the parties entered into the said Purchase Agreement #25178 (Id. ¶ 5). The Bill of Sale referencing the Purchase Agreement states that the Grantor does execute and deliver and will cause to be done, executed, and delivered all such further acts, transfers, assignments, and conveyances for the better assuring, conveying, and confirming to the Grantee, its successors and assigns, all of the equipment hereby assigned, transferred, and conveyed as Grantee, its successors or assigns as it shall reasonably require. (Id. ¶ 6).

Finally, the Bill of Sale referencing such Purchase Agreement states, "This Bill of Sale and the covenants and agreements herein shall be binding upon Grantor, its successors and assigns, and shall inure to the benefit of Grantee, its successors and assigns." (Exhibit 2, ¶ 7). It also contains the specific serial numbers and identification of equipment referenced above. Exhibit 3 is the Payphone and Equipment List. The Equipment List indicates the payphones, equipment, location, and corresponding serial numbers of same, subject to the Telephone Equipment Lease Agreement. (Exhibit 4) herewith.

The Bill of Sale effectively vests all rights, title, and interest in the payphones and the equipment for the consideration indicated in the Bill of Sale, pursuant to the BCI

Purchase Agreement #25178. The BCI Purchase Agreement is legally subject to recordation by its very terms under the recording laws of the appropriate state. The Bill of Sale specifically requires BCI, the "Grantor," to "warrant and defend title to the equipment sold to Financial World Companies against all persons whomsoever and warrants that the title transferred is good and its transfer rightful." (Exhibit 2, ¶ 4). The Bill of Sale is executed by the president of BCI, making it enforceable against it. In the first part of this analysis, BCI, the agent acting on behalf of ETS, has fully vested by the Bill of Sale all rights, title, and interest in Financial World Companies, Inc. This includes legal possession of the payphones, equipment, and location placing the aforesaid control in the hands of Financial World Companies, Inc.

The Telephone Equipment Lease Agreement (Exhibit 4), identifies who holds ownership rights control/power and power over the payphones, equipment and location of same. Note that it provides that all rights, title, and interest to the payphones, equipment, and location is vested in Financial World Companies, the "Lessor", under the Lease Agreement" (Exhibit 4), supra. ETS, the "Lessee," only has the right to control the payphone, equipment, and any additional equipment added on by the Lessee (ETS) [if] it is in full compliance with all of the Terms and Conditions of the Agreement, as set out above (Exhibit 4). This is a not a standard Lease Agreement. It is specific as to a number of terms, including, but not limited to the following: the duration of the Lease, amount to be paid monthly to Lessors in rental installments, and the fact that the Lease Agreement does not contain nor shall it be construed in any manner whatsoeve: that ETS acquires any right, title or interest in the payphones, equipment, or additional equipment or location except (1) a Right of First Refusal and an Option to Sell

Agreement under paragraphs 15 and 16 of the Agreement (Exhibit 4, ¶(s) 4, 15, 16). ETS is responsible for all taxes and other charges and must provide full indemnification and insurance coverage for the payphones, equipment, the location in the substantial amounts of $10,000 for property damage, $500,000 for the death of or injury to any one person, and $2,000,000 for any one accident or occurrence naming Financial World Companies, Inc. as the insured and beneficiary to protect it under the Lease (Exhibit 4, pars. 7 and 8). The Lease Agreement is specific in that it identifies who has actual and enforceable control over the payphones, equipment, and additional equipment (Exhibit 4, ¶ 9). Lessor Financial World Companies, Inc. has the controlling legal rights to seven (7) methods of defaulting ETS in the event ETS violates any of the provisions of the Lease (Exhibit 4, ¶ 10(a) 1-7). These include self-help repossession provisions, allowing it to repossess the equipment from ETS without notice. Moreover, ETS' rights under the Lease "automatically terminate," and "ETS shall have no further rights to use" the payphones, equipment, additional equipment, or the location of such equipment. The repossession by Financial World Companies, Inc. may occur without demand or legal process" and it may "retake and retain" all of the payphones, equipment, additional equipment and the location, and all of the aforesaid "shall be deemed automatically assigned to Lessor; and Lessee shall have no further rights to such location, whether such rights existed during the Term hereof or arose or were to arise following termination or expiration" of the Lease (Exhibit 4, ¶ 10(b) [Remedies] (1) and (2)). The Lease provides for the Lessor to recover all of its attorneys fees and costs and to pursue ETS for any deficiency between the amount of rental due plus the reasonable cost to the Lessor recovering and re-letting the equipment, including reasonable attorneys fees and costs and

the rental sums received by the Lessor from such re-letting (Exhibit 4, ¶ 10(b)(2)).

Upon the expiration or earlier termination of the Lease, "ETS shall return" the payphones, equipment, additional equipment, and the location to Financial World Companies, Inc. in good operating condition, normal wear and tear excepted (Exhibit 4, ¶ 11). The Lessor has the right to sell all of the equipment, additional equipment, and the location to any third party with written notice of the proposed sale terms to ETS, who then has thirty (30) days from the date of its receipt of such notice of intent to sell to execute an election to purchase the equipment upon the same terms and conditions of the third party's offer (Exhibit 4, ¶ 15). The Owner/Lessor also has the equitable right to specific performance under the Lease in addition to the right to seek an injunction to prevent breaches of the provisions of the Agreement. And, the Owner/Lessor, like Financial World Companies, Inc., has the stated right to specifically enforce the Agreement in any action instituted in any Court of the United States or any State having jurisdiction over the parties, in addition to any other remedy to which it may be entitled at law or equity relating to the payphones, equipment, additional equipment, and the location, all pursuant to the Lease (Exhibit 4, ¶ 21). The Lease requires that disputes be arbitrated under the rules of the American Arbitration Association (Exhibit 4, ¶ 22) except an Interlocutory Hearing for an action for a temporary restraining order, preliminary injunction, or similar equitable relief relating to the Lease can be employed/used by the Owner/Lessor to control the subservient Lessee's limited control of payphones, equipment and location subject to the Lease. (Id., ¶ 22(a)). The Lease also provides that the Lease "shall be binding upon the parties hereto and their heirs, executors, administrators, successors, and assigns...." (Exhibit 4, ¶ 22(b)).

Regarding the issue of whether ETS has control over the subject assets, rendering the Lease Agreement an investment contract under the second prong of this Court's analysis, it is clear that the Court cannot reach such a conclusion. The overwhelming evidence benefits the Lessor, Financial World Companies, on the issue of control of the payphones, equipment, additional equipment, and the location, as set forth in Exhibits 1 through 5 herewith. ETS cannot be held liable for an actual violation of federal securities laws unless ETS is the dominate and controlling entity which had actual control over the specific transactions complained of, i.e., control over the payphones, equipment, additional equipment and the locations to same.

In substance, legal control (Exhibits 2 through 5) relates to "actual control". Actual control is both firmly established and provided for under the terms of the Lease, distinguishing the Lease from an investment contract. (Exhibits 2 through 5).

The parties' lease agreements provided that the Owner/Lessor "retains sole and complete discretion in determining whether or not to exercise "the Option Agreement", as discussed previously herein.

ETS entered into the purchase/leaseback agreements in the State of Georgia. Financial World Companies asserts that a distinction under the totality of the facts here is drawn between the "lessor-lessee" relationship. Note that Appellant SEC attempts to use these terms interchangeably. This is an error. They are not interchangeable. They are not the same. Here, the lease agreements, Exhibits 2 through 5, place Financial World Companies and 15,000 similarly situated Owners of the payphones in the dominate contractual position of "Lessor" and place ETS as "Lessee", similar to that in a

"Landlord-Tenant" relationship. The former ("Lessor-Lessee") relationship refers only to the contract and the latter "(Landlord-Tenant") refers to both to the contract and to the change in possession of the property. The **rights** of a Lessor and Lessee in control of the property are **subject to** the lease and are divided: the lessee has a **"Lease"**, an agreement which gives rise to a **relationship** whereby one owning property (real or personal) grants to another the right to possess, use and enjoy it for a specified period of time in exchange for periodic payment of a stipulated price, referred to as rent. A **"Leaseback"** is a prearranged transaction whereby [ETS] transfer/sells property and (after, ETS "Leases" it back from the purchaser [Financial World Companies, Inc.]. Black's Law Dictionary, 5th Ed. (1983) p.p. 461 and 462. possessory interest, and the Owner/Lessor has the reversionary interest in the property under the lease. See *Midcontinent Broadcasting Co. v. Dresser Industries, Inc., 486 F. Supp. 858 (1980); Viterbo v. Friedlander, 120 U.S. 707, 30 L.Ed. 776, 7 S. Ct. 962 (1886);* The relationship of Lessor-Lessee is not coexistent with that of creditor and debtor (or Investor-Investee); the latter type of the relationship arises only upon the failure of the lessee to pay rent under the lease. *Evans v. Kroh, 284 S.W. 2d 329, 58 ALR 2d 1449 (1955), cited in 49 Am. Jur. 2d 49 (1995).*

Under Georgia's law, which the parties agreed would control the transactions, (Exhibit 4, ¶ 20), "lease" and "leaseback" arrangements are specifically defined and are commonplace commercial events between the government of the State of Georgia and the commercial/private sector in and around Georgia. *Civil Code 3 11-2A-103 (1); Section 50-23-7 and 50-32-51;and Georgia Attorney General Opinions No(s). 2002-3 (June 27, 2002; 98-10 (May 16, 1998); U95-21 (Oct. 3, 1995); 95-25 (May 18, 1995); 95-41 (Oct. 5,*

1995); 95-45 (Dec. 25, 1995); general reference http://www.legis.state.ga.us/cgi-bin/htsearch.

The integrated lease agreements specifically transferred actual possession and control of the payphones, equipment, etc. to the lessee ETS, subject to ETS' required compliance with the Lease (Exhibit 4). The Owner/Lessor, Financial World Companies, Inc., had a reversionary interest and actual control of the payphones etc. upon the default of the lessee - ETS. Under the lease (Exhibits 1 through 5), the actual relationship of lessor/lessee existed, as a matter of law, rather than that of an investment contract relationship. Such relationships are mainstream activities under the Interstate Commerce Clause of the United States Constitution (supra.) and are fully supported by not less than 1,600 other payphone management companies throughout our nation. Decl. of Hooper ¶ 8.

Therefore, the second prong of the Howey test supports that the ETS' agreements are not an investment contract under the applicable law.

II. WHETHER THE 11TH CIRCUIT COURT OF APPEALS PROPERLY DETERMINED THAT THE WRITTEN AND INTEGRATED "LEASEBACK" AGREEMENTS PROVIDING THE OWNER/LESSOR WITH CONTROL INVOLVING THEIR LANDLORD-LESSEE TYPE RELATIONSHIP WAS SUFFICIENT TO DISTINGUISH IT FROM OF *SEC V. W.J. HOWE CO., ET AL.* AND 15 U.S.C.S. § 77(b)(a)(1) UNDER THE FACTS HEREIN AND WHY CONSTRUING THE "LEASEBACK" AS AN "INVESTMENT CONTRACT" WOULD RESULT IN AN UNDUE BURDEN ON

INTERSTATE COMMERCE VIOLATING THE UNITES STATES CONSTITUTION.

In ETS' case before the Bench, the District Court turned to the 1987 decision of *Albanese v. Florida National Bank of Orlando*, 823 F.2d 408 (11th Cir. 1987) for guidance. It stated,

> "Even if the Agreement's words did grant the investor sufficient potential control over their ice machines to prevent the Agreements from being securities, the record demonstrates that, in fact, any such control was illusory because Plaintiffs had no realistic alternative to allow PCI to manage their investments. See *Gordon,* 684 P.2d at 741; *Williamson*, 645 F.2d at 419-24." (Id. at p. 412).

> "There is no evidence in the record that there were other companies which Plaintiff could hire to manage their ice cream machines. The only reference in the record to another such company is *Jeffries Cabinets*, which one of the Plaintiffs mentioned in a deposition. Even that company, according to the deposition, was only a service company and did not offer the wide range of management services that PCI offered... The record demonstrates, however, that Plaintiffs did not rely upon PCI actually to service the machines or to collect the proceeds. Rather Plaintiffs relied upon PCI's **management** of the ice machines. That management involved all of the components of directing the enterprise, whether it be placing the machines or repairing and maintaining them. Although Plaintiffs might in a technical sense have been able to contract with the same companies with him PCI contracted for services, there is no indication

that this was a realistic alternative. Even though some Plaintiffs were experienced businessmen, none of them had any experience in placing, managing, or servicing ice machines. *Cf., W.J. Howey Co.*, 328 U.S. at 295, 66 S.Ct. at 1101."

The Declaration of Hooper and Exhibits 1 through 5 defeat any conclusion that control was illusory because Financial World Companies and other similarly situated Owners/Lessors possessed at all times full, written and legal power and control over the phones and products and this fact directly equates to actual, physical possession and control of the payphones, equipment, additional equipment, and the location over the same. Unlike the 11th Circuit's *Albanese* case, the Owner/Lessor herein had total, real and legal power, under the integrated contracts, to control the payphones, etc., including the location of the payphones, etc. (Exhibit 4, ¶ 6 [Location]). Exhibit 4, ¶ 6 regarding [Location] of the Lease Agreement provides that ETS, the Lessee, shall be responsible for selecting the location for installation of the equipment and has the right and sole authority to move the equipment to a new location should the original location prove to be unprofitable or prove to be in a high vandalism area, constituting the main reasons for a different location mutually acknowledged by the Lessor and Lessee. However, "Lessor will be notified in the event of site exchange and will receive notification of the address of the new location" (Id. ¶ 6). ETS/Lessee "shall assign the applicable location lease" to Owner/Lessor, Financial World Companies, by a "written letter of assignment between the parties" (Id. ¶ 6) transferring that right to control the location lease to Owner/Lessor. As customary in all lease and purchase/leaseback agreements, whether it involves the leasing of real estate, heavy equipment, vehicles, medical equipment, aircraft, or as here, payphones, equipment, additional equipment (Id., ¶ 9), the

equipment shall at all times during the Term hereof be under the sole and absolute control of Lessee [ETS], **subject to the rights of the Lessor** (Exhibit 4) (emphasis in underline and bold supplied). Upon expiration or earlier termination of the said Lease Agreement, ETS is required to return the payphones and equipment, etc. to Financial World Companies in good operating condition, normal wear and tear excepted (Id. ¶ 11). It is the Lessor, at all times, who\which retains the legal power, as set out in the Lease Agreement, to sell the equipment, additional equipment, or/and the location to ETS or any other third party (Id. pars. 12, 14, 15, and 16) after the agreed notice to Lessee ETS (Id. ¶ 19) of the lease. The strength and dominance of the Option Agreement (Exhibit 5), incorporated into the Lease Agreement (Exhibit 4), inures to the benefit of the Owner/Lessor, who retains sole and complete discretion in determining whether to exercise the options under it (Exhibit 5, ¶ 1). In fact, the Option Agreement vests dominant control to the Lessor, who is "entitled to require Lessee to purchase the equipment prior to or upon termination of the Lease Agreement" (Id. 5, ¶ 4) and is further subject to the Lease Agreement which vest controlling power to the Owner/Lessor (Id.).

When the SEC interfered into ETS' payphone businesses, said leases were in good standing, and forcing ETS, had made/paid all of the payments due and owing to the Lessors under the Lease. Said another way, the Lessors herein never incurred a loss until the SEC improperly intervened, restraining ETS's ability to make payments on the leases and forcing the Lessors into a position of having no control over the leases, forcing all of the leases into default, and ETS ultimately, into bankruptcy. This involuntary default on all of the leases quite obviously caused the Lessor to incur losses on the Leases. Lessors, like Financial World Companies, Inc. took losses, not because of any acts or

conduct of ETS/PSA or Twin Leafs, but only because of the government's improper and wrongful interference with the private and valid Lessor/Lessee relationships and binding Lease Agreement (Id. fn.3),[3] existing in Interstate Commerce. See Decl. of Hooper ¶ 9.

These are, without a doubt, binding agreements giving real, actual and dominate power or influence over contract activities and relationships of an entity is deemed a "control person." *Kersh v. General Council of Assemblies of God*, 804 F.2d 546, 548 (9th Cir. 1986), one who formulates and directs corporate policy or who is deeply involved in the important business affairs of a corporation. *State ex rel. McLeod v. C&L Corp., Inc.*, 280 S.Ct. 519, 313 S.E.2d 334, 341 (S.C. App. 1984). Note that Exhibits 4 and 5 are signed by the Chief Executive Officer ("CEO") of each company. Financial Wold CEO Mr. Charles E. Edwards signed as the CEO for the subservient Lessee, ETS. Mr. Frank G. Hooper signed the written integrated agreements on behalf of Financial World as its CEO. The Lessor/Lessee relationship is completely controlled by the lease agreements, including the Telephone Lease Agreement (Exhibit 4) and the Option Agreement (Exhibit 5). ETS has no actual power which may exceed the legal power of the written agreements between the parties. Owner/Lessor, Financial World Companies, Inc., is the "control person" with the dominant rights which may be

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[3] **"Binding Agreement"** means a contract which is enforceable, such as an offer to buy or sell when the person to whom it is made accepts it and communicates his acceptance and consideration is exchanged. **Bill of Sale** in contracts means a written agreement, formerly limited to one under seal by which a person assigns or transfers his rights to or interests in goods and personal chattels to another - a legal document which conveys title from Seller to Buyer. *Black's Law Dictionary*, 6th Ed. (1990).

enforced, including but not limited to, full injunctive power, even if and while there is a dispute between the parties relating to any aspect of the agreements **concurrent** with enforcement of specific performance of the agreements (Exhibit 4, pars. 21 and 22(a) and Exhibit 5, pars. 3, 4, 5, 6, and 7(a)). The Bill of Sale (Exhibit 2) bears the official and original gold seal authenticating the vesting of ownership and the guarantee of rights, titles and interest to the Grantee, Financial World Companies, Inc. and divests the same interests from ETS or its agent, BCI. Of these three agreements, it is clear that the Bill of Sale, Lease Agreement, and Option Agreement allowed that the Owner/Lessor , could be empowered, in reality, in the Lessor/Lessee relationship (supra.) Moreover, **the over 30 years of leasing** experience of Financial World Companies, Inc. was sufficient to make an objective, reasonable, and prudent business decision as to whether to enter into such agreements or allow or continue to allow ETS/PSA or Twin Leaf to have any influence or involvement relating to the payphones, equipment, additional equipment, and/or location, all of which are subject to the parties' agreements. See Decl. of Hooper, and Exhibits 2 through 5. Financial World Companies degree and level of control, as Lessor, over the subservient ETS, as a matter of law, is sufficient to disqualify the Agreements as" investment contracts"under the Securities Act, and applicable law. See *Howey* and *Albanese*, (supra.) ETS only has the limited right to control, and only as to the equipments' location subject to its being in good standing under the Lease Agreement and subject to conditions of notice; otherwise ETS will be in danger, of triggering the rights of Lessor, Financial World Companies, as to utilization of the self-help, repossession, specific performance, and injunctive relief remedies under the Lease Agreement (Exhibit 4, pars. 6, 10(a)(6), and (b)(1)(2), 12, 17, 22, and Exhibit 5). Again, if ETS defaults on the Lease, Financial World Companies, like all other

Owners/Lessors, may activate their right to utilization of the self-help, repossession, specific performance, and injunctive relief remedies under the Lease Agreement (Exhibit 4 ¶ 6, and (b)(1)(2), 12, 17, 22, and Exhibit 5) to fully control the property and the Lessor/ETS.

The Lease Agreement also compels ETS to remove any mechanics' liens on the equipment or additional equipment for any work performed on same (Exhibit 4, ¶ 10(7)) or constitutes a default, triggering the remedies under paragraph 10 and 22 of the Lease Agreement. This absolutely establishes, as a matter of law and fact, that the "right to inspect", is accompanied by full "right to control" the physical control, operation, service, sale, resale, possession, and the rights to utilize self-help repossession and/or the judicial system to enforce those rights of control under the Bill of Sale, Lease Agreement and Option Agreement(Exhibit 2 through 5). Decl. Hooper, ¶ 6.

These [rights] are not illusory. They are real and legally enforceable, placing the case outside of the parameters of the control of the *Howey* case, supra.

Further, Lessee ETS was required to maintain substantial indemnification and insurance coverage to protect Owner/Lessor Financial World Companies from any loss or damage from the use or maintenance of the payphones etc. All taxes whatsoever are the legal obligation of ETS (Exhibit 4, ¶ 8). No illusory promise, appointment, or condition exists in the integrated agreements (Exhibit 2 through 5).

The written and binding agreements between the parties clearly did not leave to ETS any choice regarding performance or non-performance. Such would be typical of an illusory promise or agreement. There were no alternative

choices which ETS could have selected which would have rendered the integrated agreements, just illusory promises. There were no terms in the parties' agreements which left ETS' performance optional; nor was there any provision of supposed promise entirely within ETS' discretion, pleasure, or control under the agreements. As set forth herein, Financial World Companies and the other similarly situated Lessors/Owners at all times maintained the dominant legal and actual control over the payphones, equipment, additional equipment, and the location, with the exception of a change of location, which allowed ETS to move the subject payphones and related equipment to a new location upon the occurrence of two strictly identified conditions: (1) "The original location proved to be unprofitable" or (2) "the original location proved to be in a high vandalism area" (Exhibit 4, ¶ 6). The integrated agreements (Exhibits 1 through 5) eliminate any conclusion that the obligations of ETS or the benefits of control by the Owner/Lessor was illusory.

The integrated agreements providing full non-illusory control to the Owner/Lessor relationship with Lessee ETS is part of the normal and traditional contractual dealings of the nationwide flow of interstate commerce with real life and real world objectives. Owner/Lessors were fully aware of their individual/collective options to select from the over 1,600 other payphone managers, etc. nationwide rather than choose ETS. Decl. of Hooper, ¶ 8. They chose ETS. The integrated agreements are clear, definite and certain. They do not contain any vague or ambiguous language. They include the requirement to arbitrate all disputes pursuant to the American Arbitration Association provisions. (Exhibit 4 ¶ 22).

The agreements establishing the actual "control" **for** the parties are what they are: Purchase and leaseback

agreements transferring possession to ETS to the agreements (Exhibit 2 through 5), and a revisionary interest to Financial World Companies and 15,000 similarly situated Owner/Lessors. The contracts memorialize the Owner/Lessor's and Lessee's commitment to adhere to the integrated contracts regime of balancing the legal rights, disputes and the control issues affecting the parties' relationships. **"That regime has a real world objective; it is not designed for regulation of a game lacking practical consequences."** *C and L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma 532 U.S.. 292 (April, 2001) [Upholding arbitration provision against defense of sovereign immunity].*

The parties' commitment to achieve the goals of the agreements real world objective were non-illusory and these same parties were actually receiving the benefits of the relationship of Lessor-Lessee, as they mutually intended. The integrated arguments were designed for regulation of the said relationship, having practical business consequences with potential disputes (Exhibits 2 through 5) and understood as such. To the real world's end, the Lease and Option Agreement (Exhibits 4 and 5) specifically authorize judicial enforcement of the agreements through injunctive restraint/control, arbitration and adjudication (Exhibit 4, ¶'s 10, 11, 16, 17, 19, 21, 22 and 23; Exhibits 5 ¶'s 1-8) over the Seller/Lessee, ETS.

Therefore, the valid and enforceable integrated contracts would be rendered meaningless if misconstrued as "investment contracts" as the S.E.C. has already done. Suffice it to say the third element of the *Howey* test cannot be satisfied according to these facts.

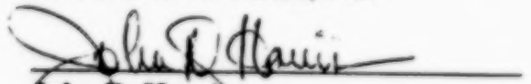
This Court is respectfully requested to sustain the Decision of the 11th Circuit Court of Appeals which determined the parties' agreements were not investment contracts, which would fall under the *Howey* test interpreting the subject Securities Act.

CONCLUSION

For the reasons stated, the Judgment of the 11th Circuit Court of Appeals should be sustained. The *Howey* test is inapplicable.

Dated this 29th day of October, 2003

HARRIS LAW FIRM, P.C.



John D. Harris
Randy D. Lang
Attorneys for Financial World Companies, Inc.

EXHIBIT 1

EXHIBIT 1

DECLARATION OF FRANK G. HOOPER IN SUPPORT OF AMICUS CURIAE BRIEF FOR RESPONDENTS ETS PAYPHONES, INC. ET AL.

1. The facts herein are of my own personal knowledge. If called upon to testify to those facts, I could and would do so competently. I am over the age of 18 years. I am a non-party in the underlying action but have the same or similar interests of Respondent, ETS, Inc., as a typical representative of thousands of Lessors representing millions of dollars of capital and income to the Lessors whose interests were affected by the Securities and Exchange Commission in this case.

2. I am the Chief Executive Officer and a Member of the Board of Directors of Financial World Companies, which was formed in Colorado in January, 1973. Financial World Companies is a multi-faceted financial company. The company has had diverse interests in life insurance, health insurance, leasing, employee benefit plans, accounting, lending, and other income yielding assets. It also has experience in management of assets, and control of other diverse investments. I do not use the word "investment" in a legal sense but in an ordinary business sense. It covers an extremely broad range of business-related activities, which include investment for profit, tax benefits, and other types of yields or benefits.

3. In particular, Financial World Companies has had a strong interest in the purchase leaseback type business arrangements because of the reasonable, profitable yield and tax benefits and the very diverse and broad range of products which

can be **controlled** by the Owner, which then becomes the Lessor in the contractual arrangement. It is this aspect of legal control over the product, item or thing ("Product") which is expressly stated in the written contracts entered into by the parties. Such written contracts include the lease agreements like the ones involving Mr. Edwards, ETS and PSA. When the contracts are integrated, like they are in our transactions with ETS, they provide the required control to the Owner/Lessor in these lease-type arrangements. The purchase/leaseback arrangements also provide for a consistent, profitable yield, maximum tax advantages, credit profile, leverage, market dominance, flexibility with the Product, and other beneficial features, whether it involves a short-term or long-term purchase leaseback business. Other business benefits and leverages relating to purchase/leaseback of the Product are that they are generally easier to monitor while being used by the Lessee, and the arranging and entering of the contractual relationship between the Lessor and Lessee can be done from a central location and both monitored and controlled nationwide. This is especially true with regard to payphones.

4. I have personal knowledge and familiarity with the attached Exhibits 2 through 5, the Bill of Sale, the Equipment List, the Telephone Lease Agreement, and the Option Agreement which are attached to the Amicus Curiae Brief and incorporated herein by reference. As the CEO of Financial World Companies, I carefully analyzed the existing market, possible market trends, and the upside and downside of purchasing payphones from BEE Communications, Inc. ("BCI"). BCI sold payphone(s) and protective enclosure(s) and other items (hereinafter sometimes referred to as "the payphones" or "equipment", as more particularly set forth in Exhibits 2-4). These Exhibits 2 through 5 are an integrated series of documents consisting of the written contractual

agreements between the Owner/Lessor and the Lessee. Each Owner/Lessor clearly understood the degree of control they had over the lessee and the Product involving the purchase/leaseback provisions of the written contracts before purchasing the subject payphones. Financial World is an example of one of the hundreds of these payphone owners which had no difficulty understanding the basic concepts of the purchase/leaseback, ownership, and control over the payphones. In fact, many have previously leased some sort of asset or product in their lifetime. I never encountered a single adult Owner/Lessor that did not understand what a payphone is and how it works and the way users use payphones, including the potential for abuse and vandalism. All of the owners of the payphones understood the general dynamics of how the purchase/leaseback and the contents of the working written agreements protected their interests, and mine, as well.

5. As the CEO of Financial World, I personally undertook and completed the due diligence inquiry regarding E.T.S. Payphones, Inc. ("ETS"), Payphone Systems Acquisitions, Inc. ("PSA"), Twin Leaf, Inc. and Mr. Charles E. Edwards prior to purchasing the Product and entering the purchase/leaseback type contracts. After a reasonably diligent and prudent investigation of Mr. Edwards, ETS, PSA, and Twin Leaf, and after consulting with attorneys and other knowledgeable persons with the purchase/leaseback agreements and the accompanying documentation, I was and still am convinced that at all times before and after entering into the subject lease-related contracts that we did and continued to maintain complete legal control, including rights of actual control over the Product as set forth in Exhibits 2-5 herein.

6. In fact, during the entire term that Financial World and the other similarly situated payphone were a part of the written contracts with ETS etc., we received a reasonable rate

of return, as expected. Such returns were similar to other leasing activities we had previously and continued to be engaged in regarding other products. The payphone Product was probably one of the best, because you could realize a net return within a very short period of time. It could also be determined whether or not the payphone was located in a good public area and used by the public with little or no vandalism. If the particular location chosen from the onset proved to be unproductive, the payphone could simply be relocated, with little out-of-pocket expense, paid for by ETS. Remember that ETS, as the Lessee, did not make any money unless the payphone itself produced money. Pursuant to Exhibits 2-5, as usual, the Lessee, ETS, was completely responsible for the payphones in every respect. This included insuring the Owners/Lessors against losses, paying for maintenance, and the responsibility for the taxes as well. Any transfer of interest was always subject to written approval and a separate written agreement between us as the Lessors and ETS. All aspects of the payphone benefitted the Owner/Lessor over the Lessee (ETS), as specifically set forth in this Amicus Curiae Brief and said Exhibits. I also add that there was not a lot of hoopla, fancy words, or intricate marketing that related to or was connected with the payphone purchases and the leaseback written contracts. The primary element scrutinized, as in all purchase/leaseback business deals, is whether or not the Owner/Lessor, through the written documentation, has a secured interest which is valid and legally enforceable over the payphone or Product in the event the Lessee/ETS, defaults under the agreements. This element was satisfied. In fact, in my opinion, the agreements identified as Exhibits 2 through 5 gave us as the Owner/Lessor more legal control, lien rights and other protections, including the right to exercise self-help repossession, the right to sell the payphones, telephone numbers, equipment, and location to other third-parties and limited ETS

as the Lessee under the terms, conditions, and duration of the Lease. To my knowledge, ETS never misrepresented any aspect of the integrated written agreements and kept all commitments under the agreements with us. In fact, we were very happy with the purchase/leaseback business involving Mr. Edwards, ETS, PSA, and Twin Leaf and the payphone business.

7. To my knowledge, the only times that Financial World Companies and the other 15,000 similarly situated Owners/Lessors became disappointed, and unhappy with ETS were on two occasions. The first was in or about September, 2000 when the Securities and Exchange Commission filed a lawsuit alleging securities violations against ETS in the United States District Court for the Northern District of Georgia, D.C., Case No. 00-02532-CV-JTC-1, claiming that our leases and the integrated written documentation (Exhibits 2-5) constituted a regulated security investment which had not been registered by ETS and that ETS was allegedly in violation of the securities laws. Thereafter, the Securities and Exchange Commission obtained a preliminary injunction, freezing all of ETS' assets, forcing ETS to file a Petition for Bankruptcy and Reorganization. ETS was forced to stop making the lease payments to the telephone owners, Financial World Companies and the 15,000 similarly situated Owners representative of this Amicus Curiae Brief. The second occasion of our disappointment resulted when Financial World Companies and the other 15,000 similarly situated Owners/Lessors were forced to exchange their leaseback and Product interests for common stock in ETS in an attempt to mitigate their losses caused by the Securities and Exchange Commission. However, there was no way to mitigate the impact that the Securities and Exchange Commission had on ETS and its reputation that anybody involved and engaged in business with ETS/PSA or Twin Leaf was engaged in widespread fraud. This had the effect of impugning and destroying the reputation of the

individual Owners/Lessors, which included Financial World Companies, but also all other similarly situated Owners who supported and continue to support Mr. Edwards, ETS, PSA, and Twin Leaf..

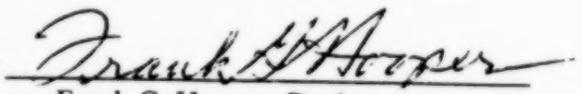
8. It was also clearly understood that there were other business management organizations available to the Owners/Lessors in the event we chose to no longer do business with ETS. These include management companies which were very well known in the industry, such as Alfa-Tel Com, Inc., Trans-Star Communications, Inc., Select Payphones of America, and numerous other operating businesses located in Florida, New York, California and otherwise across the United States. We could have terminated the purchase/leaseback written contracts with ETS, pursuant to the terms of the agreements at its expiration, or in the event ETS defaulted on any lease and we could have started doing business with a number of other management companies. Please note that these other companies were not fly-by-night companies. They were well known in the payphone management business industry in which ETS, PSA, and Twin Leaf had to compete for our business.

9. I believe that on behalf of, Financial World Companies, the 15,000 other similarly situated payphone Owners/Lessors, and myself that this Amicus Curiae Brief is submitted on our behalf in good faith to explain more of the factual details which were not fully considered in the earlier proceedings in the United States District Court or the of the 11th Circuit Court of Appeals. This is a very important issue before this Court, affecting thousands of people, representing millions of dollars which were prematurely cut-off and destroyed by the Securities and Exchange Commission. We are aware the Securities and Exchange Commission usually acts so as to protect the public against investment artifices and

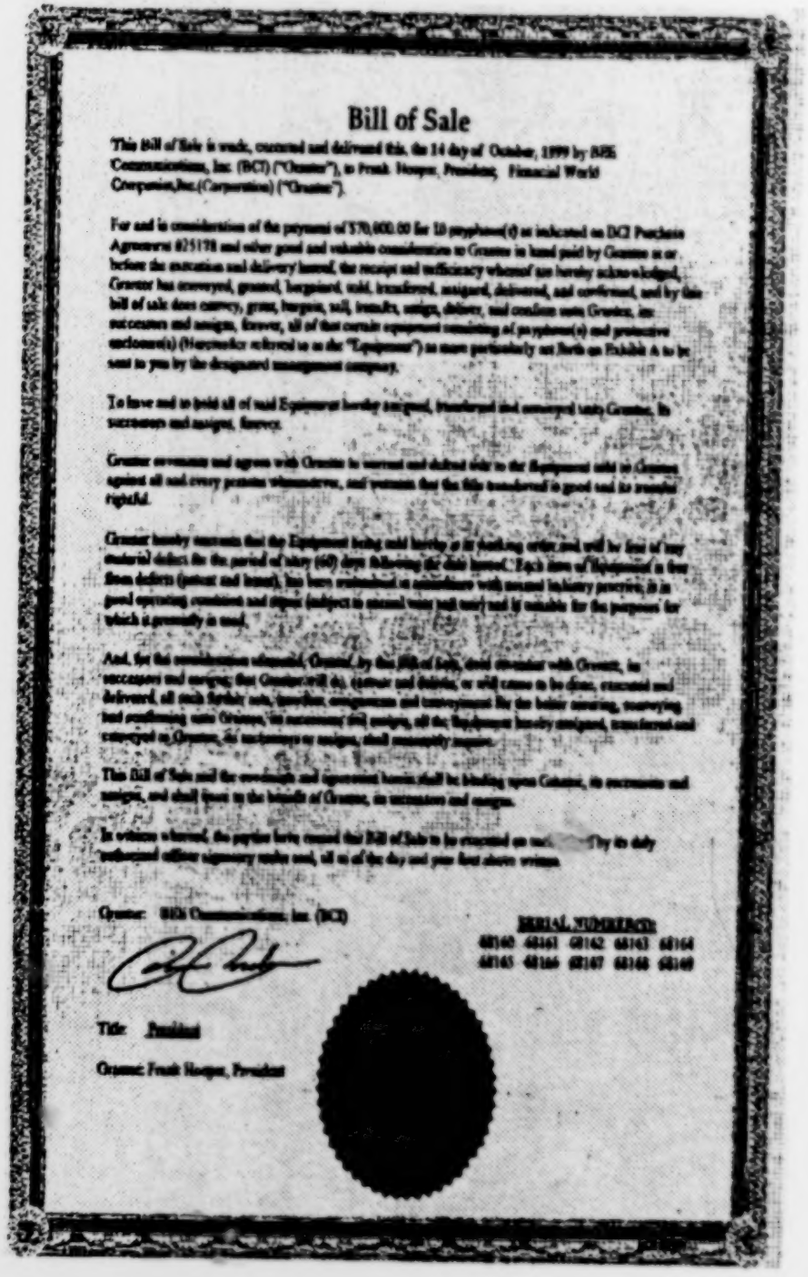
schemes, and we appreciate that fact. However, this was not an investment artifice or scheme but was a legitimate business purchase/leaseback deal which was financially benefitting the Owner/Lessor; until the Securities and Exchange Commission became involved and mistakenly terminated ETS' business activities.

I declare under penalty of perjury the foregoing is true and correct to the best of my knowledge.

Dated: October 28, 2003

By 

Frank G. Hooper, Declarent



Bill of Sale

This Bill of Sale is made, executed and delivered this the 14 day of October, 1999 by BIS Communications, Inc. (BCI) ("Grantor"), to Frank Hooper, President, Financial World Corporation,Inc.(Corporation) ("Grantee").

For and in consideration of the payment of $70,800.00 for 10 prepayment(s) as indicated on DCI Purchase Agreement #25178 and other good and valuable consideration to Grantor in hand paid by Grantee at or before the execution and delivery hereof, the receipt and sufficiency whereof are hereby acknowledged, Grantor has conveyed, granted, bargained, sold, transferred, assigned, delivered, and confirmed, and by this bill of sale does convey, grant, bargain, sell, transfer, assign, deliver, and confirm unto Grantee, its successors and assigns, forever, all of that certain equipment consisting of prepayment(s) and protective enclosure(s) (Hereinafter referred to as the "Equipment") as more particularly set forth on Exhibit A to be sent to you by the designated management company.

To have and to hold all of said Equipment hereby assigned, transferred and conveyed unto Grantee, its successors and assigns, forever.

Grantor covenants and agrees with Grantee to warrant and defend title to the Equipment sold to Grantee against all and every persons whomsoever, and warrants that the title transferred is good and its transfer rightful.

Grantor hereby warrants that the Equipment being sold hereby is in working order and will be free of any material defect for the period of sixty (60) days following the date hereof. Each item of Equipment is free from defects (patent and latent), has been maintained in accordance with normal industry practice, is in good operating condition and repair (subject to normal wear and tear) and is suitable for the purposes for which it presently is used.

And, for the consideration aforesaid, Grantor, by this Bill of Sale, does covenant with Grantee, its successors and assigns, that Grantor will do, (cause and deliver, or will cause to be done, executed and delivered, all such further acts, transfers, assignments and conveyances for the better assuring, conveying and confirming unto Grantee, its successors and assigns, all the Equipment hereby assigned, transferred and conveyed as Grantee, its successors or assigns, shall reasonably require.

This Bill of Sale and the covenants and agreements herein shall be binding upon Grantor, its successors and assigns, and shall inure to the benefit of Grantee, its successors and assigns.

In witness whereof, the parties have caused this Bill of Sale to be executed on its behalf by its duly authorized officer signatory under seal, all as of the day and year first above written.

Grantor: BIS Communications, Inc. (BCI)

SERIAL NUMBERS:
68160 68161 68162 68163 68164
68165 68166 68167 68168 68169

Title: President

Grantee: Frank Hooper, President

EXHIBIT 2

BEST AVAILABLE COPY

Lease: 10437
Date: 04/18/00

THE EQUIPMENT
(Exhibit "A")

The equipment described herein constitutes ten (10) units of operating payphone stations.

Unit 1: Location: OLDE BRAINERD SHOPPING CENTER #2 — Serial #: 68160
4011 BRAINERD RD
CHATTANOOGA, TN 37411
Phone #: 423-629-8035 Tone

Unit 2: Location: HURT TUESDAY — Serial #: 68161
131 CROSSROADS BLVD
CARY, NC 27511
Phone #: 919-854-9246 Tone

Unit 3: Location: E-Z SERVE #503 — Serial #: 68162
910 FIRST AVE SW
HICKORY, NC 28601
Phone #: 828-304-9958 Tone

Unit 4: Location: WESTERN CAROLINA RESCUE/ WOMEN — Serial #: 68163
235 PATTON AVE
ASHEVILLE, NC 28801
Phone #: 828-252-9829 Tone

Unit 5: Location: DAIRY QUEEN/ BRAZIER — Serial #: 68164
2270 S RIDGEWOOD AVE
SOUTH DAYTONA, FL 32119
Phone #: 904-756-9710 also to provide the incoming calls

Unit 6: Location: EPIPHANY THRIFT STORE — Serial #: 68165
5120 S RIDGEWOOD AVE
DAYTONA BEACH, FL 32127
Phone #: 904-756-9898 Disconnected

Unit 7: Location: E-Z SERVE #4328 #1 — Serial #: 68166
HWY 69 & 90
GRAND RIDGE, FL 32442
Phone #: 850-592-1167 Tone

Unit 8: Location: E-Z SERVE #4328 #2 — Serial #: 68167
HWY 69 & 90
GRAND RIDGE, FL 32442
Phone #: 850-592-1168 Tone

EXHIBIT 3

Lease: 10437
Date: 04/18/00

T H E E Q U I P M E N T
(Exhibit "A")

Unit #: Location: E-Z SERVE #7366 #3 — Serial #: 68168
3494 OLIVE RD
PENSACOLA, FL 32504
Phone #: 850-478-8803 T-n-c

Unit 10: Location: E-Z SERVE #7276 #1 — Serial #: 68169
1600 S HWY 29
GONZALEZ, FL 32580
Phone #: 850-937-9515 T-n-c

Lease: 10437
Date: 12/29/99

T H E E Q U I P M E N T
(Exhibit "A")

The equipment described herein constitutes ten (10) units of operating payphone stations.

Unit 1: Serial #: 68160
Unit 2: Serial #: 68161
Unit 3: Serial #: 68162
Unit 4: Serial #: 68163
Unit 5: Serial #: 68164
Unit 6: Serial #: 68165
Unit 7: Serial #: 68166
Unit 8: Serial #: 68167
Unit 9: Serial #: 68168
Unit 10: Serial #: 68169

Telephone Equipment Lease Agreement

Lease Number: 10437

THIS AGREEMENT is made and entered into this 15th day of December, 1999, by and between ETS Payphones, Inc., a Georgia corporation (hereinafter as "LESSEE") and FINANCIAL WORLD COMPANIES INC (Corporation) (hereinafter "LESSOR").

Witnesseth:

WHEREAS, LESSOR, as owner of ten (10) unit(s) of the telephone EQUIPMENT described on Exhibit A, attached hereto and by reference made a part hereof (the "EQUIPMENT") desires to lease said EQUIPMENT to LESSEE and LESSEE desires to lease said EQUIPMENT from LESSOR, all upon the terms and subject to the conditions hereinafter set forth.

NOW, THEREFORE, for and in consideration of the mutual promises and covenants herein contained and for good and valuable consideration, the receipt and sufficiency whereof are hereby acknowledged, the parties hereto, intending to be legally bound, hereby agree as follows:

1. **LEASE OF EQUIPMENT.** Subject to the conditions herein, LESSOR hereby leases the EQUIPMENT to LESSEE and LESSEE hereby leases the EQUIPMENT from LESSOR.

2. **TERM.** This lease shall commence (the "Commencement Date") as of the date provided above and shall remain in full force and effect for an Initial Term of sixty (60) months thereafter (the "Initial Term"). Upon the expiration of said Initial Term, this lease shall be automatically renewed, for an additional Renewal Term of sixty (60) months (the "Renewal Term") unless at least ninety (90) days prior to the end of the Initial Term, either party gives written notice to the other that said party elects not to continue during the Renewal Term. The Initial Term and the Renewal Term are hereinafter collectively deemed the "Term" of this lease. The monthly rent payment for the EQUIPMENT during such Renewal Term shall be the same as the existing rate under the Initial Term. Should LESSOR choose to terminate this lease and take possession of the EQUIPMENT and LOCATION prior to the lease expiration, LESSOR may do so with a ninety (90) day written notice.

3. **RENT.** LESSEE shall pay monthly rental to LESSOR for the EQUIPMENT at the rate of $82.00 per month per unit. The first monthly rental payment shall be due on the "Commencement Date." All subsequent monthly rental payments shall be due on the 1st or 15th day of each succeeding calendar month in accordance with the "Commencement Date" through the Term hereof.

   Note: LESSOR Rental checks shall be sent out by U.S. Mail and shall be sent on the 1st or 15th day of each month. However, should the 1st or 15th of the month fall on a Saturday or Sunday, the checks shall be sent the following Monday.

4. **TITLE.** This Agreement creates a lease of the EQUIPMENT. Nothing contained herein shall be deemed or construed as enabling LESSEE to acquire the right, title or interest in the EQUIPMENT or LOCATION, except as set forth in Sections 15 and 16 hereof.

5. **NET LEASE.** Except as expressly provided herein, the parties hereto expressly agree to and acknowledge that this is a "Net Lease" requiring LESSEE to bear the entire cost of using the EQUIPMENT and LOCATION through the Term of this lease. LESSEE shall be responsible for, and shall pay all expenses of, insurance, repair, service and maintenance of the EQUIPMENT and of the

EXHIBIT 4

LOCATION. LESSEE may, at LESSEE's expense, contract with third parties to provide such repair, service and maintenance.

6. **LOCATION.** The location of the EQUIPMENT shall be set forth on Exhibit A. LESSEE shall be responsible for selecting the location for installation of the EQUIPMENT. Lessee has the right and sole authority to move EQUIPMENT to a new location should the original location prove to be unprofitable or prove to be in a high vandalism area. LESSOR will be notified in the event of site exchange and will receive notification of the address of the new location. LESSEE shall assign the applicable location lease to the LESSOR by a written letter of assignment between the parties. In the event that LESSOR terminates the lease prior to the expiration of the Term and elects to retain the EQUIPMENT, LESSEE shall assign the applicable location lease to the LESSOR by a written letter of assignment between the parties; otherwise LESSEE shall retain the rights to the location.

7. **INDEMNIFICATION AND INSURANCE.**

a. LESSEE shall indemnify and hold LESSOR harmless from and against any and all loss, damage, liability and expense (including, without limitation, reasonable attorney's fees) which LESSOR shall sustain as a result of (i) the loss of or damage to the EQUIPMENT because of fire, theft, collision, lightning, flood, windstorm, or any other casualty at any time during the Term hereof, or (ii) the death of or injury to any person or damage to any property as a result, in whole or in part, of the use or maintenance of the EQUIPMENT at any time during the Term of this Lease.

b. LESSEE's obligations pursuant to Section 7a above shall be deemed satisfied if LESSEE obtains and maintains in full force and effect throughout the Term hereof, at the sole cost and expense of LESSEE, a policy or policies of insurance issued by an insurer reasonably satisfactory to LESSOR, with premiums prepaid thereon, insuring LESSEE against the risks and hazards specified in Section 7a(i) hereof with minimum coverage of $100,000 for property damage ($500,000 for the death of or injury to any one person) and $2,000,000 for any one accident or occurrence.

c. LESSEE's failure to obtain the insurance coverage specified in Section 7b hereof shall not affect LESSEE's obligations under this lease. The loss of, damage to or destruction of the EQUIPMENT shall not terminate this Lease; nor to the extent that LESSOR is actually compensated by insurance paid for by LESSEE, as herein provided, relieve LESSEE from LESSEE's liability hereunder. Should LESSEE fail to so procure or maintain the insurance required under this Section 7, then LESSOR shall have the option, but not the obligation, to procure or maintain such insurance coverage for the account of LESSEE, and in that event, LESSEE shall reimburse LESSOR within seven (7) days after receipt of any invoice for any payment made therefore by LESSOR. Failure to so reimburse LESSOR shall be deemed a default under the terms of Section 10 hereof.

8. **TAXES AND OTHER CHARGES.** LESSEE shall pay, when due, any and all use taxes, personal property taxes and any and all other taxes which may be imposed by the ownership, possession, use or operation of the EQUIPMENT at any time during the Term hereof or which are levied against or measured by the gross receipts delivered to LESSOR as a result of the payment of rent by LESSEE hereunder.

9. **USE, OPERATION, ALTERATIONS AND ADDITIONS.** The EQUIPMENT shall at all times during the Term hereof be under the sole and absolute control of LESSEE, subject to the rights of LESSOR in the event of a default by LESSEE as provided herein. LESSEE shall comply

with any and all laws and regulations applicable to the operation of the EQUIPMENT, and shall be solely responsible for the payment of any and all fines or penalties resulting from its failure to comply therewith. LESSEE shall maintain the EQUIPMENT in good working order at the location identified on Exhibit A, attached hereto, at all times throughout the Term hereof or at any other location where the EQUIPMENT may have been relocated. LESSEE may from time to time add further parts or accessories to the EQUIPMENT, provided any such addition does not materially affect or materially impair the value of the EQUIPMENT. Any such additions shall become the property of the LESSOR.

10. **DEFAULT AND REMEDIES**

a. **DEFAULT.** The occurrence of any one of the following events shall constitute an event of default by LESSEE:

1. A default by LESSEE in the payment of any amount due hereunder as and when the same shall become due and the continuance of such default for a period of more than twenty (20) days following LESSEE's receipt of written notice of such default requiring the same to be cured; or

2. A default by LESSEE in the performance of any of its material obligations under this Lease and the continuance of such default for a period of more than thirty (30) days following LESSEE's receipt of written notice of such default requiring the same to be cured; provided, however, that if more than thirty (30) days are reasonably required in order to cure any such default, then no default shall be deemed to have occurred so long as the curing of such default is commenced by LESSEE within such thirty (30) day period and LESSEE thereafter diligently prosecutes the curing of such default to completion; or

3. Whenever an involuntary petition shall be filed against LESSEE under any bankruptcy or insolvency law or under the reorganization provisions of any law or like import, or a receiver of LESSEE of or for the property of LESSEE shall be appointed without the acquiescence of LESSEE and such situation under this section 10a-3 shall continue and remain undischarged or unstayed for an aggregate period of thirty (30) days (whether or not consecutive) or shall not be remedied by LESSEE within thirty (30) days; or

4. Whenever LESSEE shall make an assignment of the property of LESSEE for the benefit of creditors, shall file a voluntary petition under any bankruptcy or insolvency law, or whenever any court of competent jurisdiction shall approve a petition filed by LESSEE under the reorganization provisions of the United States Bankruptcy Act or under the provisions of any law or like import; or

5. The abandonment of the EQUIPMENT by LESSEE or the discontinuance of the operation of such EQUIPMENT by LESSEE; or

6. The failure to notify LESSOR of any relocation within sixty (60) days; or

7. The failure of LESSEE to remove within thirty (30) days any mechanics liens on the EQUIPMENT for additional work performed on such EQUIPMENT.

b. **REMEDIES.** Upon the occurrence of an event of default under Section 10a above which is continuing and remains uncured, then LESSOR may, at its option, during the continuance of such event of default:

1. Terminate this lease by written notice to LESSEE and recover from LESSEE damages incurred by reason of such default, including the reasonable costs of recovering the EQUIPMENT and reasonable attorney's fees relating thereto, in which event LESSEE shall immediately surrender the EQUIPMENT to LESSOR, and if LESSEE fails to do so, LESSOR may take possession of the EQUIPMENT; and in that event, any rights to the EQUIPMENT that LESSEE may possess pursuant to this lease shall automatically terminate; LESSEE shall have no further right to use of the EQUIPMENT; LESSOR may, without demand or legal process, retake and retain the EQUIPMENT; all rights of LESSEE in and to the location of the installed EQUIPMENT shall be deemed automatically assigned to LESSOR; and LESSEE shall have no further rights to such location whether such rights existed during the Term hereof or arose or were to arise following termination or expiration hereof; or

2. Without terminating this lease, enter upon the location thereof and take possession of the EQUIPMENT and thereupon relet the EQUIPMENT, as LESSEE's agent, at the best price obtainable by reasonable efforts, and in such event, LESSEE shall be liable to LESSOR for any deficiency between (i) the amount of rental due hereunder plus the reasonable cost to LESSOR of recovering and reletting the EQUIPMENT, including reasonable attorney's fees, and (ii) the rental received by LESSOR from such reletting.

11. **SURRENDER.** Except as set forth herein, upon the expiration or earlier termination of this lease, LESSEE shall return the EQUIPMENT and LOCATION to LESSOR in good operating condition, normal wear and tear excepted.

12. **RIGHT OF INSPECTION.** LESSOR shall have the right at all times throughout the Term hereof to inspect the EQUIPMENT whenever and wherever the same shall be located.

13. **WARRANTIES AND CLAIMS THEREUNDER.** LESSOR makes no warranty or representation, expressed or implied, with respect to the EQUIPMENT; provided, however, that the EQUIPMENT shall be subject to any standard warranty of the manufacturers of such EQUIPMENT or components thereof. LESSOR hereby appoints LESSEE as its agent and attorney-in-fact throughout the Term hereof to assert and enforce, at LESSEE's sole expense, any claims LESSOR may have as owner of the EQUIPMENT against any vendor, manufacturer or supplier with respect thereto.

14. **ASSIGNMENT.** LESSEE shall have the right to assign or sell any of its rights hereunder. LESSOR shall have the right to sell or assign its rights hereunder, including any or all of LESSOR's right, title and interest in and to the EQUIPMENT and location and the rent reserved herein. In the event of such assignment by LESSOR, the assignee thereof shall thereupon acquire all rights and remedies possessed by or available to LESSOR. Upon receiving proper notice of any such assignment, LESSEE shall thereafter make any and all rental payments as therein directed.

15. **RIGHT OF FIRST REFUSAL.** In the event LESSOR obtains an offer from a third party for the purchase of the EQUIPMENT, then LESSOR shall thereupon provide LESSEE with written notice of the proposed sale and terms thereof. LESSEE shall thereafter have thirty (30) days from the date of its receipt of such notice in which to give written notice to LESSOR of its election to purchase the EQUIPMENT upon the same terms and conditions as the third-party offer. If LESSOR does not

receive written notice of such election from LESSEE within such thirty (30) day period, then LESSOR shall be free to sell the EQUIPMENT pursuant to such third-party offer. Should LESSEE notify LESSOR of its election to purchase, then LESSEE shall have one hundred eighty (180)days to close sale from the date of the original notice.

16. **OPTION TO SELL AGREEMENT.** Should LESSOR choose to sell the equipment to the LESSEE prior to or upon the end of the Term of the Lease, then LESSOR shall execute the Option To Sell Agreement attached hereto and by reference made a part hereof as Exhibit B. The terms and conditions of the Option to Sell Agreement shall govern the purchase by the LESSEE of the EQUIPMENT. LESSEE shall have one hundred eighty (180) days from the date of receipt of the original written notice to purchase said EQUIPMENT.

17. **PERSONAL PROPERTY:** The EQUIPMENT is and at all times throughout the Term hereof shall remain personal property, even if all or any portion of the EQUIPMENT becomes affixed or attached in any matter whatsoever to any real property.

18. **ACKNOWLEDGMENT OF DISCRETION.** LESSOR represents and warrants that (a) LESSOR is free to enter into agreements with parties other than LESSEE for the economic exploitation of the EQUIPMENT; (b) LESSOR was not required to enter into this lease as a condition to purchasing the EQUIPMENT; and (c) LESSOR has freely and voluntarily entered into this lease and acknowledges that LESSOR is not entering into or executing this lease in reliance upon any promise, representation or warranty not contained herein.

19. **NOTICES.** Any and all notices required or permitted hereunder shall be notarized in writing and sent to the intended recipient, addressed to its address set forth below, either by registered or certified mail, return receipt requested, postage prepaid, overnite delivery service, or personal delivery. Each such notarized notice shall be effective (a) if given by mail, as of three (3) business days after such notice or communication is deposited in the United States Mail; (b); if sent for overnite delivery via Federal Express or other reputable national overnite delivery service, one (1) business day after such notice or delivery is entrusted to such service, with recipient signature required; or (c) if personally delivered, when delivered at the address of the intended recipient. Any party may change the address to which notices or other communications hereunder are to be delivered by giving the other party notice in the manner set forth herein. Any notice required to be made within a stated period of time shall be considered timely mailed if deposited before midnight of the last day of the stated period.

20. **GOVERNING LAW.** This Agreement shall be governed by and construed in accordance with the laws of the State of Georgia.

21. **SPECIFIC PERFORMANCE.** Each party acknowledges and agrees that the other party would be damaged irreparably in the event any of the provisions of this Agreement are not performed in accordance with their specific terms or otherwise are breached. Accordingly, each party agrees that the other party shall be entitled to an injunction or injunctions to prevent breaches of the provisions of this Agreement and to specifically enforce this Agreement and the terms and provisions hereof in any action instituted in any court of the United States or any state thereof having jurisdiction over the parties and the matter, in addition to any other remedy to which it may be entitled, at law or in equity.

22. **DISPUTE RESOLUTION CONTRACT PROVISION.**

a. **DISPUTE.** Any dispute, controversy, or claim of whatever nature (except an interlocutory hearing for an action for a temporary restraining order, preliminary injunction, or similar

equitable relief) asserted by any party against another party arising out of, or relating to, this Agreement or the breach hereof, shall be settled by arbitration, if requested, by any party pursuant to this Section 21. The arbitration shall be conducted by one (1) arbitrator, who shall be appointed pursuant to the Commercial Arbitration Rules of the American Arbitration Association ("AAA"). The arbitration shall be held in Atlanta, Georgia, and shall be conducted in accordance with the Commercial Arbitration Rules of the AAA, except that the rules set forth in this Section 21 shall govern such arbitration to the extent that they conflict with the rules of the AAA.

b NOTICE. Upon written notice by a party to another party of a request for arbitration hereunder, the parties shall use their best efforts to cause the arbitration to be conducted in an expeditious manner, with such arbitration to be completed within sixty (60) days after selection of an arbitrator. In the arbitration, Georgia law shall govern, except to the extent those laws conflict with the Commercial Arbitration Rules of the AAA and the provisions of this Section 21. There shall be no discovery except as the arbitrator shall permit following determination by the arbitrator that the party seeking such discovery has a substantial demonstrable need. All other procedural matters shall be within the discretion of the arbitrator. In the event a party fails to comply with the procedures in any arbitration in any manner determined by the arbitrator, the arbitrator shall fix a reasonable period of time for compliance and, if the party fails to comply within such period, a remedy deemed just by the arbitrator, including, without limitation, an award of default, may be imposed.

23. MISCELLANEOUS. This Agreement shall be binding upon the parties hereto and their heirs, executors, administrators, successors and assigns. Wherever possible each provision of this Agreement shall be interpreted in such a manner as to be effective and valid under applicable law, but if any provision hereof shall be prohibited or invalid under applicable law, such provision shall be ineffective to the extent of such prohibition or invalidity without invalidating the remainder of such provision or remaining provisions of this Agreement. No delay or failure on the part of either party in the exercise of any right or remedy hereunder shall operate as a waiver thereof, nor as an acquiescence in any default, nor shall any single or partial exercise by either party of any right or remedy preclude any other right or remedy. This Agreement and the documents referred to herein constitutes the entire agreement between the parties concerning the subject matter hereof, and any other agreements or understandings of any nature with respect to such matters are hereby superseded and revoked. This Agreement shall not be modified or amended except in writing signed by both parties. This Agreement may be executed and delivered in any number of counterparts, including facsimile counterparts, all of which when executed and delivered shall have the force and effect of an original. In construing this Agreement, feminine or neuter pronouns shall be substituted for those masculine in form and vice versa in any place where the context so requires, and plural terms shall be substituted for singular and singular for plural in any place where the context so requires. The headings in this Agreement are inserted for convenience only and are not a part of the Agreement.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals as of the date first above written.

Check one ☐ Individual ☐ Partnership ☒ Corporation ☐ Self-Directed IRA ☐ Trust ☐ Joint Tenancy with Rights of Survivorship ☐ Other:

LESSEE: ETS Payphones, Inc.	LESSOR: FINANCIAL WORLD COMPANIES INC
By: Charles G. Edwards	By: David B. Hayden, Pres.
Title: CEO	Title: President
Address: 561 Thornton Road, Suite K Lithia Springs, GA 30122	Address: 3500 ROLLING GREEN DR #O-53 FORT COLLINS, CO 80525
Telephone Number: (770) 819-1600	Telephone Number: (970) 225-2797
Date: December 15, 1999	Date: 12/15/1999

Option To Sell AGREEMENT

(Exhibit B to Telephone Lease Agreement)

THIS AGREEMENT is made and entered into as of the 15th day of December, 1999, by and between FINANCIAL WORLD COMPANIES INC (Corporation) (hereinafter referred to as "LESSOR"), and ETS Payphones, Inc., a Georgia Corporation (hereinafter referred to as "LESSEE").

THE PARTIES HERETO ACKNOWLEDGE THAT THIS AGREEMENT INURES TO THE BENEFIT OF LESSOR, AND THAT LESSOR RETAINS SOLE AND COMPLETE DISCRETION IN DETERMINING WHETHER OR NOT TO EXERCISE THE REQUIREMENTS HEREINAFTER SET FORTH.

WITNESSETH:

WHEREAS LESSOR is the owner of ten (10) unit(s) of pay telephone Equipment (the "Equipment") pursuant to that certain PURCHASE AGREEMENT dated October 14, 1999, as reflected on Invoice Number 25178 related thereto; and

WHEREAS, LESSOR and LESSEE have entered into that certain Lease Agreement (the "Lease Agreement") dated December 15, 1999 bearing Lease number 10437, pursuant to which LESSEE has LEASED the Equipment from LESSOR; and

WHEREAS, pursuant to the Lease Agreement, LESSOR is entitled to require LESSEE to purchase the Equipment prior to or upon termination of the LEASE AGREEMENT; and

WHEREAS, the parties have therefore determined that it would be appropriate and in their mutual best interests to enter into this Option to Sell Agreement in order to evidence the rights of LESSOR and the obligations of LESSEE for the sale and purchase of said Equipment; and

WHEREAS, certain terms used herein without definition shall have the meanings ascribed thereto in the Lease Agreement, and this Option to Sell Agreement is made subject to the terms and conditions of said Lease Agreement, all of which are incorporated herein and by reference made a part hereof;

NOW, THEREFORE, for and in consideration of the mutual promises and covenants herein contained and for other good and valuable consideration, the receipt and sufficiency whereof is hereby acknowledged, the parties agree as follows:

1. **Agreement to Purchase Equipment.** Subject to the terms and conditions set forth herein, LESSEE agrees to purchase the Equipment from LESSOR if LESSOR elects to sell such Equipment. If LESSOR desires that LESSEE purchase the Equipment prior to or upon expiration of the Lease Agreement, then LESSOR shall give written notice to LESSEE of such requirement. LESSEE shall have 180 days from the date of receipt of written notice to purchase equipment should LESSOR wish to sell.

2. **Purchase Price.** The price to be paid by LESSEE to LESSOR for such Equipment (the "Purchase Price") shall be Seven Thousand and no/100ths Dollars ($7,000.00) per unit. The Purchase Price shall be payable by the LESSEE's delivery of a check for the aggregate amount thereof to LESSOR at LESSOR's address set forth herein.

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EXHIBIT 6

of the AAA and the provisions of this Section 7. There shall be no discovery except as the arbitrator shall permit following determination by the arbitrator that the party seeking such discovery has a substantial demonstrable need. All other procedural matters shall be within the discretion of the arbitrator. In the event a party fails to comply with the procedures in any arbitration in any manner determined by the arbitrator, the arbitrator shall fix a reasonable period of time for compliance and, if the party fails to comply within such period, a remedy deemed just by the arbitrator, including, without limitation, an award of default, may be imposed.

8. **MISCELLANEOUS.** This Option to Sell Agreement shall be binding upon the parties hereto and their heirs, executors, administrators, successors and assigns. Wherever possible each provision of this Option to Sell Agreement shall be interpreted in such a manner as to be effective and valid under applicable law, but if any provision hereof shall be prohibited or invalid under applicable law, such provision shall be ineffective to the extent of such prohibition or invalidity without invalidating the remainder of such provision or remaining provisions of this Option to Sell Agreement. No delay or failure on the part of either party in the exercise of any right or remedy hereunder shall operate as a waiver thereof, nor as an acquiescence in any default, nor shall any single or partial exercise by either party of any right or remedy preclude any other right or remedy. This Option to Sell Agreement and the documents referred to herein constitutes the entire agreement between the parties concerning the subject matter hereof, and any other agreements or understandings of any nature with respect to such matters are hereby superseded and revoked. This Option to sell Agreement shall not be modified or amended except in writing signed by both parties. This Option to Sell Agreement may be executed and delivered in any number of counterparts, including facsimile counterparts, all of which when executed and delivered shall have the force and effect of an original. In construing this Option to Sell Agreement, feminine or neuter pronouns shall be substituted for those masculine in form and vice versa in any place where the context so requires, and plural terms shall be substituted for singular and singular for plural in any place where the context so requires. The headings in this Option to Sell Agreement are inserted for convenience only and are not a part of the Option to Sell Agreement.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals as of the date first above written.

LESSEE: ETS Payphones, Inc.	LESSOR: FINANCIAL WORLD COMPANIES INC
By:	By:
Charles E. Edwards	
Charles E. Edwards	
CEO	President